IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.349 of 1992

Decided on : December 11, 2007

State of H.P. **…Appellant.**

Versus

Pawan Kumar **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. D.S. Nainta, Deputy Advocate General.

For the Respondent : Mr. R.K. Gautam, Senior Advocate, with Mr. Naveen Bhardwaj, Advocate.

Surjit Singh, Judge(Oral)

This appeal by the State is directed against the judgment of the Children Court, whereby respondent Pawan Kumar, who was charged with and tried for offences punishable under Sections 307 IPC and 25 and 27 of the Indian Arms Act, 1959, has been acquitted. Appellant seeks the reversal of the judgment of acquittal of the said Court and the conviction of the respondent for the aforesaid offences.

2. Deceased Mohinder Kumar was present near a pillar of the verandah of his house around 5.30 p.m. on 16th June, 1989 and his sister PW-1 Sushma was present in the courtyard near a water tap. In the meanwhile, PW-2 Sunil Kumar, a cousin of deceased Mohinder Kumar, reached the courtyard of the house of the deceased, with a container, as he was going to fetch milk. Deceased Mohinder Kumar was supposed to accompany PW-2 Sunil Kumar. As the two were

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Whether reporters of the local papers may be allowed to see the judgment?

preparing to leave for fetching milk, the respondent also reached there with a loaded gun and asked PW-2 Sunil Kumar that he too would be accompanying him. On reaching the courtyard, the respondent declared that the gun was loaded and simultaneously he aimed the gun at deceased Mohinder Kumar and pressed the trigger. The gun-shot hit deceased Mohinder Kumar on his left cheek bone, as a result of which he fell with a bleeding wound. PW-1 Sushma raised hue and cry, on hearing which her mother and several other persons, including PW-6 Jagdish Lal and PW-5 Paras Ram, father of PW-2 Sunil Kumar, reached the spot. After some time, the father of the deceased also reached. Deceased was taken to the Primary Health Centre, situated in the village where the incident took place. PW-16 Dr. S.P. Singh, the Medical Officer, Primary Health Centre, declared that Mohinder Kumar was dead. He recorded the following observations, based on external appearance of the dead body, in his report Ex. PW-16/A:

> "1. There was an injury at left side of the face just below the left lateral angle of the left eye. It is about 4" x 3.5 cm. Injury is very deep unable to measure. Surrounding skull was blackish in colour. Edges were not sharp. There was slight bleeding on pressing the side of the injury.
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> 2. Left maxillary left temporal occipital wound were fractured. But there was no external was present except the face.
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> 3. Haematoma present at the left temporal region, right and left occipital region and left forehead.
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> 4. On examination there was no pulse not head sound pupil were not reacting to light. Pupils were dilated. Body was pale in colour."

5. Around 7.15 p.m., Police was informed by PW-6 Jagdish Lal, Pradhan of the Panchayat. The information was entered in the *Rojnamcha,* vide entry, copy Ex. PW-12/A. As per this report, deceased Mohinder Kumar had been shot dead by the respondent, by

means of a gun. Police reached the spot. Inquest was conducted. Dead body was sent to the District Hospital, Hamirpur, for postmortem. Postmortem was conducted by PW-15 Dr. N.K. Sharma, who opined that the cause of death was the injury on the face caused by gunshot.

6. Respondent, being delinquent, was sent up for trial to Children Court at Una. He was charged with offences punishable under Sections 304 IPC and 25 & 27 of the Indian Arms Act, 1959. He pleaded not guilty. Therefore, he was tried. At the end of the trial, he was acquitted.

7. Plea set up by the respondent was that as a matter of fact he was carrying the gun to his field, on the directions of his father, and that on the way when he was passing through the courtyard of deceased Mohinder Kumar, PW-2 Sunil Kumar asked that he wanted to see the gun by holding it in his own hands. The respondent told him that it was loaded, but PW-2 Sunil Kumar insisted on taking the same in his hands and started snatching it from him (the respondent). In that process, the trigger got pressed accidentally and the shot hit the deceased. Trial Court has accepted this plea of the respondent.

8. We have heard the learned Deputy Advocate General and perused the record.

9. The evidence on record does suggest that the plea of the respondent is probable. PW-6 Jagdish Lal, the Pradhan of the Panchayat, who informed the police telephonically at 7.15 p.m., testified that when he reached the spot, he saw the deceased lying in the courtyard with a bleeding injury on his face and the respondent with a gun in his hand, and when he enquired from the respondent as to what had happened he stated that PW-2 Sunil Kumar wanted to hold the gun but when he did not give it to him, as the same was loaded, he

tried to take it forcibly from him and in that process it went off and the shot hit the deceased. Even though, he was declared hostile by the prosecution and was cross-examined and even confronted with the narration in the inquest report, which bears his signature, per which the respondent had fired the shot at the deceased, and, therefore, what he has stated in the Court may not be a gospel truth, yet there are some other circumstances, which do suggest that his testimony may not be incorrect. It has come in the evidence that the respondent had declared that the gun was loaded. Now, if he had reached the verandah of the house of the deceased with the loaded gun, with intent to kill the deceased, where was the occasion for him to have declared that the gun was loaded. May be that he made such a declaration, only when PW-2 Sunil Kumar asked that the gun be handed over to him and then he tried to grab it from him. It has been admitted by PW-1 Sushma, the sister of the deceased, as also by PW-2 Sunil Kumar that the respondent had said that the gun was loaded. Again, the incident had taken place at 5.30 p.m. and within a few minutes PW-6 Jagdish Lal and PW-5 Paras Ram, a brother of the father of the deceased, reached the spot, but the police was informed of the incident telephonically at 7.15 p.m. No explanation has been offered for not informing the police about the incident promptly. This delay also probabilizes the defence plea, because had the incident taken place in the manner alleged by the prosecution, the police would have been informed promptly or atleast simultaneously with the shifting of the deceased to the Primary Health Centre.

10. PW-16 Dr. S.P. Singh has stated that when the dead body was brought to the Primary Health Centre, people were saying that the deceased had sustained injury, on account of fall on a wooden log from

the roof top and PW-5 Paras Ram was present when the people were saying so and he did not contradict those people. The witness was cross-examined with the leave of the Court. However, from the circumstances, it appears that what he has stated may not be untrue. It has come in the evidence that the dead body had been taken back to the house of the father of the deceased after PW-16 Dr. S.P. Singh declared that the deceased was dead and made a report of external injuries. Had the doctor been informed that the deceased had been fired at and killed by the respondent or for that matter by any other person, he would not have allowed the dead body to be taken back, but would have called the police. Furthermore, it is not the case of the prosecution that when the deceased was taken to the Primary Health Centre, PW-5 Paras Ram or the father of the deceased or for that matter any other person told the doctor that the injury had been sustained by the deceased, by gun shot.

11. Now, if the respondent had fired the shot aiming the gun at the deceased, as alleged by the prosecution and this fact had been brought to the notice of PW-5 Paras Ram and PW-6 Jagdish Lal as soon as they reached the spot, PW-5 Paras Ram should not have kept quiet when the people were saying at the Primary Health Centre that the cause of death was the fall of the deceased on a wooden log from the roof top. May be that this story was being floated at the Primary Health Centre, with a view to saving PW-2 Sunil Kumar, the son of PW-5 Paras Ram, who, according to the defence version, was responsible for the accidental firing of the gun.

12. Taking back of the dead body from the Primary Health Centre to the house of the father of the deceased probabilizes the defence plea, from another angle also. Now, if it were a case of

intentionally firing of gun shot, the father and the father's brother of the deceased would have not only informed the police promptly but would have also asked for the postmortem examination of the dead body and would not have taken it back to their house. From their conduct, in taking the dead body back to their house, it appears that they did not want any police action in the matter. This could not have been without any reason and the reason probably was the involvement of PW-2 Sunil Kumar, a first cousin of the deceased, in the accidental firing of the gun shot. The fact that the dead body had been taken back to the house of the father of the deceased is testified by PW-1 Sushma and PW-2 Sunil Kumar.

13. Another circumstance, which probabilizes the defence version, is the fact that even though prosecution story is that the respondent fired the gun shot at the deceased after declaring that it was loaded, meaning thereby that he came prepared to the spot to kill the deceased, which implies that he intended to kill him, yet the challan was filed against the respondent for offence punishable under Section 304 IPC and not for the offence of murder, punishable under Section 302 IPC. No explanation has been offered by the prosecution for not seeking the trial of the respondent for offence of murder, punishable under Section 302 IPC.

14. Taking into consideration the abovestated position, we feel that the view taken by the trial Court is possible from the evidence on record. Hence, the appeal is dismissed.

(Surjit Singh), J

December 11, 2007(sd) **(Surinder Singh), J**